

1 claim of ineffective assistance of trial counsel. That single claim of ineffective
2 assistance of trial counsel encompassed both grounds for relief raised in the instant
3 Petition, that is, both petitioner's claim that he told his counsel the witnesses were
4 lying and petitioner's claim that his counsel failed to test for blood on the knife.
5 *See* Petition filed May 5, 2010 in case no. CV 10-3358-ODW (SP). In a Report
6 and Recommendation filed June 15, 2012, the Magistrate Judge considered the
7 claim on its merits, and recommended rejecting the claim and denying the petition
8 with prejudice. On July 25, 2012, this Court filed an order accepting the Report
9 and Recommendation, and filed a Judgment denying the petition and dismissing
10 the action with prejudice.

11 Rule 4 of the Rules Governing Section 2254 Cases authorizes the Court to
12 summarily dismiss a habeas petition "[i]f it plainly appears from the petition and
13 any exhibits annexed to it that the petitioner is not entitled to relief in the district
14 court." Rule 4 also authorizes dismissals on procedural grounds. *See* 28 U.S.C.
15 foll. § 2254, Rule 4 Advisory Committee Note (1976); *White v. Lewis*, 874 F.2d
16 599, 602 (9th Cir. 1989). Here, the Petition must be dismissed because it presents
17 claims already adjudicated by this Court in the prior petition in case number CV
18 10-3358-ODW (SP).

19 The law in these circumstances allows for no discretion. "A claim presented
20 in a second or successive habeas corpus application under section 2254 that was
21 presented in a prior application shall be dismissed." 28 U.S.C. § 2244(b)(1). The
22 Supreme Court has specifically stated: "If the prisoner asserts a claim that he has
23 already presented in a previous federal habeas petition, the claim must be
24 dismissed in all cases." *Tyler v. Cain*, 533 U.S. 656, 661, 121 S. Ct. 2478, 150 L.
25 Ed. 2d 632 (2001) (citing 28 U.S.C. § 2244(b)(1)).

26 As discussed above, the claims petitioner presents in the instant Petition are
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1 identical to, and subsumed within, the first claim petitioner presented in his earlier
2 petition in case number CV 10-3358-ODW (SP). Moreover, even if petitioner's
3 approach to these ineffective assistance claims were slightly different this time,
4 that would not render them permissible under § 2244(b)(1). In a case in which a
5 petitioner sought to present successive ineffective assistance claims in successive
6 petitions, the Ninth Circuit held that raising new factual grounds is "not sufficient
7 to evade the mandatory dismissal requirement of 28 U.S.C. § 2244(b)," as "[t]he
8 gravamen of the claim of ineffective assistance of trial counsel is the same,
9 regardless of whether Petitioner presents new and different legal arguments or
10 different factual allegations." *Cooper v. Brown*, 510 F.3d 870, 931 (9th Cir. 2007)
11 (citing *Babbitt v. Woodford*, 177 F.3d 744, 746 (9th Cir. 1999) (where a prisoner
12 sought to raise another ineffective assistance claim in a successive § 2254 petition
13 asserting "new factual explanations for his counsel's ineffectiveness at trial,"
14 § 2244(b)(1) would require dismissal because "the gravamen of his legal argument
15 is essentially the same")). As such, § 2244(b)(1) requires dismissal of the two
16 claims raised in the instant Petition, which were already raised, considered, and
17 rejected by this Court in petitioner's prior § 2254 petition.

18 The instant Petition appears to suffer from other defects as well. There is no
19 indication that petitioner obtained permission from the Court of Appeals to file a
20 successive § 2254 petition, as is required before petitioner may file a successive
21 petition in this Court. *See* 28 U.S.C. § 2244(b)(3). Also, the Petition appears
22 likely time-barred under 28 U.S.C. § 2244(d). But the Court need not reach these
23 matters since § 2244(b)(1) so plainly requires dismissal.

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1 IT IS THEREFORE ORDERED that Judgment be entered summarily
2 dismissing the Petition and this action.

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4 DATED: December 14, 2012



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6 HONORABLE OTIS D. WRIGHT, II
7 UNITED STATES DISTRICT JUDGE

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9 Presented by:



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11 SHERI PYM
12 UNITED STATES MAGISTRATE JUDGE